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Negligence: The Standard of Care Required of Physicians

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The writer contends that a valid consideration consists of a benefit to the promisor to which he is not already entitled, and a detriment to the promisee to which he is not already bound. Unless both these factors are present, there is no consideration, and a *fortiori* no contract.¹⁹

WILLIAM R. KNUCKLES

NEGLIGENCE: THE STANDARD OF CARE REQUIRED OF PHYSICIANS

The standard of care generally required by the courts in negligence cases is the degree of care that would be exercised by a reasonable prudent man under the circumstances. The standard of care required of a physician is the care ordinarily exercised by an average physician in good standing practicing in the same or similar locality.¹

The cases do not make it clear why this change has been made regarding physicians. There is a close analogy in the law pertaining to persons who are hindered with physical infirmities. The amount of care required of such persons takes into account their defects. Instead of holding that the physical defect is one of the circumstances, the courts have called the attention of the jury to those defects directly by requiring the standard of care as usually exercised by persons with like infirmities.² This departure from the general rule in the case of persons with physical defects was evidently made to insure the jury's consideration of these defects.

What then is the reason for the departure from the general rule in the case of physicians? The physician is required to have spent some time in preparing himself for his work. He is supposed to possess more knowledge about the practice of medicine than the layman. It is only fair then that the physician should be held to exercise a greater amount of skill than the layman. This requirement could have been fulfilled by requiring the degree of care exercised by a reasonable prudent man under the circumstances, one of the circumstances being that defendant is a physician. Such a standard however does not call the attention of the jury directly enough to the special skill and learning of the defendant. In order to impress the jury with the fact that defendant holds himself out to the public as a skilled man, the courts could have required the exercise of the degree of care generally exercised by an average physician. This requirement would have been

¹⁹ Moore v. Kuster, 238 Ky. 292 (1931).

¹ Dunman v. Raney, 118 Ark. 337, 176 S. W. 339 (1915); Whitsell v. Hill, 101 Iowa 630, 70 N. W. 750 (1899); Wilks v. Black, 188 Mich. 478, 164 N. W. 561 (1915); Hales v. Raines, 146 Mo. App. 232, 130 S. W. 425 (1910).

² Ham v. City of Lewiston, 94 Maine 265, 47 Atl. 548 (1900); Carter v. Village of Nunda, 66 N. Y. Supp. 1059, 55 App. Div. 501 (1900). Plaintiff however in going about public places alone was called upon to exercise such reasonable care and caution for his own safety as an ordinary prudent person with a like infirmity would have exercised.

satisfactory but for the fact that the term *average physician* is too broad. To determine who is an average physician it is not intended that all the quacks, the poor doctors, the good doctors, and the very best be aggregated and a medium struck between them. Such a method would place the average too low.³ To remedy this the courts have found it necessary to require the care of an average physician *in good standing*.⁴

The English courts have been content with requiring the care exercised by an ordinary physician.⁵ The American courts have further qualified the standard by requiring the degree of care of an average physician in good standing *practicing in the same or similar locality*. Nowhere is there given a precise rationalization of this last qualification.

Some sections of the country have better equipment than others; even so, it should not affect the standard of care. Regardless of whether the physician has any equipment at all, he should be held to exercise the degree of care of an average physician in good standing. The type and quality of the equipment is only a circumstance and should not affect the standard of care.

The primary purpose of the qualification apparently is to make a distinction between the city and the country doctor. It is well known that the city offers the young physician more opportunity and more chance for advancement. It is only natural that the city should attract the better men in the profession, leaving the less-qualified doctors to practice in the country. If this be true, it could well be that the average country doctor would be incapable of exercising the same amount of care as exercised by the average city doctor. In such a case it would in fact be discouraging the practice of medicine in the country to require the same skill and knowledge of both the city and the country doctor.

As yet there has been little said by the courts as to the extent of territory embraced by the words *in the same or similar locality*. It has been said that these words include the entire organized community.⁶ Thus it would be flexible enough to include the town of Oskaloosa, Iowa;⁷ or a city the size of St. Louis, Missouri.⁸

In the above rationalization of the American standard it is seen that a distinction is made between a city doctor and a country doctor.

³ *Holtzman v. Hoy*, 118 Ill. 534, 8 N. E. 832 (1886).

⁴ *Comeaux v. Miles*, 118 So. 786 (La. 1928); *Seewald v. Gentry*, 220 Mo. App. 367, 248 S. W. 445 (1926).

⁵ *Rich v. Pierpont*, 3 F. & F. 35 (1862); *Hancke v. Hooper*, 7 Car. & P. 81, (1830); 22 *Halsbury's Laws of England* 318, 319.

⁶ *Note* (1929) 78 U. of Pa. Law Rev. 91, 97.

⁷ *Vander Wal v. Abbot*, 167 N. W. 182 (Iowa 1918).

⁸ *McClarin v. Grenzmeider*, 146 Mo. App. 478, 126 S. W. 817 (1910); *Hoover v. McCormick*, 197 Ky. 509, 247 S. W. 718 (1923). (The locality is not where the services are rendered but where the physician practices.)

There are no cases in which a distinction has been made between a general practitioner practicing in the poor sections of a city and a practitioner practicing in the wealthy sections of the same city. The same reasons for a distinction between the city and the country doctor apply equally well in support of a distinction between two doctors practicing in different sections of the same city. As the distinction is made in one case and not in the other, the American standard sets up an arbitrary requirement.

If the rule were changed to require the physician to exercise the degree of care ordinarily exercised by average members of the profession in good standing practicing under similar circumstances, it would cease to be an arbitrary one. Stated as above, the rule would maintain the objective standard of the average physician in good standing and it would do away with the arbitrary requirement making a distinction between a city doctor and a country doctor and refusing to make a distinction between two doctors practicing under different circumstances in the same city. The locality would simply become one of the circumstances and would be taken into consideration along with the type of equipment and other attendant circumstances of each particular case.

There are two other features of the American standard that should be mentioned. First a physician is not required to exercise his best skill and care so long as he measures up to the objective standard of the average physician in good standing.⁹ Secondly, a physician practicing under a school or branch of medicine other than the allopathic is held *only* to exercise the care and skill exercised by the average members of his particular school.¹⁰ The courts do not go into the comparative merits of the different schools of medicine. Thus a sanipractor is not held to exercise the care of an average physician in good standing but the care of an average sanipractor in good standing.¹¹

ROY VANCE, JR.

TRADE REGULATION: INDUCING BREACH OF CONTRACT AND REFUSAL TO DEAL IN THE ABSENCE OF CONSPIRACY AND MONOPOLY

Early in the English common law there emerged the concept of liability for inducing breach of contract where the defendant's act was tortious *per se*,¹ for example, where the act itself constituted fraud,

⁹ *Dorris v. Warford*, 124 Ky. 768, 100 S. W. 768, 14 Ann. Cases 602 (1907); *Wilks v. Black*, 188 Mich. 478, 154 N. W. 561 (1915), cited *supra* note 1. The physician is not required to possess or exercise the highest degree of skill known to the profession in order to escape liability, only such reasonable care as is generally used by physicians in similar localities. *Hales v. Raines*, 146 Mo. App. 232, 130 S. W. 425 (1910), cited *supra* note 1.

¹⁰ *Force v. Gregory*, 63 Conn. 167, 27 Atl. 1116 (1893) (homeopath); *Wilcox v. Carroll*, 127 Wash. 1, 219 Pac. 34 (1923) (sanipractor).

¹¹ *Wilcox v. Carroll*, *supra* note 10.

¹ See Restatement, Torts (vol. IV 1939) at p. 51: "Thus, in 1410, it